





4. Complainant requested an elevator pass key to operate the elevator in the building where Respondent's central office is located.
5. At all relevant times, Respondent's policy was to give an employee an elevator pass key only when: 1) the employee's job duties required the use of the elevator; or 2) the employee submitted a doctor's note providing a medical need to use the elevator. Because Complainant met neither of those requirements, Respondent denied Complainant's request.
6. All commercial passenger drivers are required to pass a Department of Transportation ("DOT") physical every two years. After passing the DOT physical, the driver receives a DOT medical certification. Per Respondent's policy, and consistent with Respondent's understanding of federal and Illinois regulations, a driver may not operate a passenger transportation vehicle without a valid DOT certification.
7. Through December 2005, Complainant maintained a valid DOT certification.
8. As of January 2006, Complainant's most recent DOT certification had expired.
9. On or about January 10, 2006, Respondent removed Complainant from service and instructed him to submit to a DOT physical given by one of Respondent's approved physicians. Complainant did not pass the DOT physical due to Respondent's physician's findings that Complainant suffered from hypertension, diabetes, shortness of breath, and arthritis, and that Complainant needed stronger eyeglasses.
10. Although Complainant failed the DOT physical, Respondent's physician agreed to give Complainant his DOT certification anyway if Complainant could provide a statement from his personal physician stating that Complainant was under that physician's care, the above conditions were under control, and the above conditions would not interfere with Complainant's work or imperil the safety of others.
11. Complainant never provided any such statement from his personal physician. Therefore, Respondent's physician never gave Complainant a DOT certification, and Complainant has remained out of service.

12. On March 23, 2006, Complainant filed a charge with the Department alleging that Respondent refused to give him an elevator pass key due to his age and race, and removed him from service due to his age and perceived handicaps. Respondent denies Complainant's allegations.

### CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).
2. Complainant cannot establish a *prima facie* case of age discrimination.
3. Complainant cannot establish a *prima facie* case of racial discrimination.
4. Complainant cannot establish a *prima facie* case of perceived handicap discrimination.
5. Respondent has articulated legitimate, nondiscriminatory reasons for refusing to give Complainant an elevator pass key and removing him from service.
6. Complainant cannot establish that Respondent's proffered reasons for the actions that it took are pretextual.
7. There is no genuine issue of material fact regarding any of Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law.

### DISCUSSION

#### I. SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed

against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

II. COMPLAINANT CANNOT ESTABLISH A *PRIMA FACIE* CASE OF AGE OR RACIAL DISCRIMINATION IN CONNECTION WITH RESPONDENT'S REFUSAL TO GIVE COMPLAINANT AN ELEVATOR PASS KEY

There are two methods for proving employment discrimination under the Act, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill. App. 3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement by Respondent that it took action against Complainant because of his age, race, or perceived handicaps), the indirect analysis is appropriate here.

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If he does, then Respondent must articulate a legitimate, nondiscriminatory reason for its action. Id. If Respondent does so, then Complainant must prove by a preponderance of evidence that Respondent's articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

To establish a *prima facie* case of age discrimination, Complainant must prove: 1) he was at least 40 years of age at the time of the adverse job action; 2) he was meeting

Respondent's legitimate performance expectations; 3) he suffered an adverse job action; and 4) similarly situated, younger employees were treated more favorably. Honaker and Rhopac Fabricators, Inc., IHRC, ALS No. 12089, July 10, 2006. Similarly, to establish a *prima facie* case of racial discrimination, Complainant must prove: 1) he is in a protected class; 2) he was meeting Respondent's legitimate performance expectations; 3) he suffered an adverse job action; and 4) similarly situated employees outside his protected class (*i.e.*, non-whites) were treated more favorably. Terry and New Hope Ctr., IHRC, ALS No. 07-109, June 3, 2009. Because the elements for the two causes of action are substantially similar, they can be analyzed together.

Respondent does not dispute that Complainant, a white male who was 68 years of age at all relevant times, is protected from unlawful age and racial discrimination. Respondent also has not challenged Complainant's claims that his job performance met Respondent's legitimate expectations, and that Respondent's refusal to give him an elevator pass key constitutes an adverse job action. However, Respondent does dispute Complainant's claim that similarly situated employees outside Complainant's protected classes were treated more favorably.

Complainant alleges that Respondent gave elevator pass keys, which allow employees to utilize the elevator at Respondent's central office, to three similarly situated, younger, black drivers: Brenda Morris, Ken Harvey, and Eddie Miles. With regard to Ms. Morris, Respondent contends that Ms. Morris, in fact, never received an elevator pass key. (M. Zuniga affidavit at 1.) Complainant has offered no affidavit or other evidence to suggest otherwise. Thus, Complainant's bald assertion regarding Ms. Morris, without more, is insufficient to create a triable issue of fact. Chevrie, 208 Ill. App. 3d at 883-84, 567 N.E.2d at 630-31.

Respondent admits that Mr. Harvey and Mr. Miles received elevator pass keys. However, according to Respondent, Mr. Harvey and Mr. Miles were not similarly situated to Complainant because Mr. Harvey and Mr. Miles qualified for elevator pass keys under company policy, while Complainant did not. At all relevant times, Respondent's policy was to give an

employee an elevator pass key only when: 1) the employee's job duties required the use of the elevator; or 2) the employee submitted a doctor's note providing a medical need to use the elevator. (Respondent's First Set of Requests to Admit at 5-6.)<sup>1</sup>

Mr. Harvey, a utility man and not a driver, received an elevator pass key because he was responsible for moving supplies between floors at Respondent's central office and taking trash to the ground floor. (Id.) In short, Mr. Harvey's job duties necessitated use of the elevator. (Id.) Though Mr. Miles was a driver like Complainant, he received an elevator pass key because he, unlike Complainant, provided Respondent with a doctor's note evidencing his medical need. (Id. at 5.) Complainant has offered no evidence that he qualified for an elevator pass key but was denied, or that Mr. Harvey and Mr. Miles, in fact, did not qualify but received elevator pass keys anyway. Therefore, Complainant cannot establish that Mr. Harvey and Mr. Miles were similarly situated to him. Accordingly, his age and racial discrimination claims must fail.

III. RESPONDENT HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY REASON FOR DENYING COMPLAINANT'S REQUEST FOR AN ELEVATOR PASS KEY, WHICH COMPLAINANT CANNOT ESTABLISH IS PRETEXTUAL

Even if Complainant could prove a *prima facie* case of age or racial discrimination, that would not be the end of the inquiry because Respondent has articulated a legitimate, nondiscriminatory reason for denying his request for an elevator pass key. As discussed above, Respondent asserts that it denied Complainant's request because Complainant did not qualify for an elevator pass key under Respondent's policy.

The issue, then, is whether Complainant can prove that Respondent's proffered reason is pretextual. To prove pretext, Complainant must show: 1) the proffered reason has no basis in fact; 2) the proffered reason did not actually motivate the decision; or 3) the proffered reason is insufficient to motivate the decision. Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283, 1286

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<sup>1</sup> Complainant filed no timely, sworn response to Respondent's First Set of Requests to Admit. Therefore, the matters asserted therein are deemed admitted. See 56 Ill. Adm. Code 5300.745(c).

(7th Cir. 1988). In short, a pretext is a lie. Hobbs v. City of Chicago, 573 F.3d 454, 461 (7th Cir. 2009).

Complainant has offered no evidence to challenge the legitimacy of Respondent's proffered reason for denying his request. Thus, even if Complainant could establish *prima facie* cases of age and racial discrimination, Complainant's claims would still fail.

#### IV. COMPLAINANT CANNOT ESTABLISH A *PRIMA FACIE* CASE OF AGE OR PERCEIVED HANDICAP DISCRIMINATION IN CONNECTION WITH RESPONDENT'S REMOVAL OF COMPLAINANT FROM SERVICE

Complainant asserts that Respondent removed him from service due to his age and perceived handicaps, namely, hypertension and diabetes. Incidentally, Complainant has framed his claim as a perceived, and not actual, handicap discrimination claim because he disagrees with the hypertension and diabetes diagnoses.

With regard to the age discrimination claim, Complainant has offered no evidence whatsoever, as he must, to suggest that Respondent failed to remove similarly situated, younger employees from service. Thus, Complainant cannot establish his age discrimination claim.

To prove a *prima facie* case of perceived handicap discrimination, Complainant must show that Respondent: 1) perceived Complainant to be handicapped; and 2) took an adverse action against him on the basis of the perception. Bartels and City of O'Fallon, IHRC, ALS No. S-11439, June 4, 2003. Regarding element one, Respondent does not dispute that it was made aware that Complainant had been diagnosed with hypertension and diabetes. However, the obvious question of whether hypertension and diabetes constitute "handicaps" within the meaning of the Act need not be reached because Complainant cannot establish that Respondent took action against him because of his hypertension and/or diabetes.

Respondent's policy, consistent with Respondent's understanding of federal and Illinois regulations, requires all commercial passenger drivers to obtain a DOT certification, which can be earned only by passing a DOT physical. (Respondent's First Set of Requests to Admit at 2.)

Without a valid DOT certification, a driver may not operate a passenger transportation vehicle for Respondent. (Id.) Accordingly, before becoming a driver for Respondent, Complainant was required to obtain, and did obtain, a DOT certification. (Id.) DOT certifications must be renewed every two years. (Id.) Complainant maintained a valid DOT certification through December 2005. (Id.)

As of January 2006, however, Complainant's most recent DOT certification had expired. (Id.) Thus, on or about January 10, 2006, Respondent removed Complainant from service and instructed him to submit to a DOT physical given by one of Respondent's approved physicians. (Id. at 3.) Complainant did not pass the DOT physical due to Respondent's physician's findings that Complainant suffered from hypertension, diabetes, shortness of breath, and arthritis, and that Complainant needed stronger eyeglasses because his corrected vision of 20/50 was too poor. (Id. at 3-4.) Furthermore, Respondent's understanding is that, in addition to prohibiting commercial drivers who lack DOT certification, federal regulations also specifically prohibit commercial drivers who have been diagnosed with hypertension, diabetes, shortness of breath, or arthritis, or whose corrected vision is 20/40 or worse. (Id.)

Although Complainant failed the DOT physical, Respondent's physician agreed to give Complainant his DOT certification anyway if Complainant could provide a statement from his personal physician stating that Complainant was under that physician's care, the above conditions were under control, and the above conditions would not interfere with Complainant's work or imperil the safety of others. (Id.) Complainant never provided any such statement from his personal physician. (Id.) Therefore, Respondent's physician did not give Complainant a DOT certification, and Complainant has remained out of service.

There is no evidence to suggest that Respondent removed Complainant from service other than because he lacked a valid DOT certification. Complainant has offered no evidence to suggest that he was removed from service due to any perceived handicaps. Moreover, Complainant has offered no evidence to suggest that it made any difference to Respondent *why*

Complainant lacked a valid DOT certification. By removing an uncertified driver from service, Respondent simply took the action that it reasonably believed federal and Illinois regulations required.

Therefore, Complainant cannot establish a *prima facie* case of perceived handicap discrimination as a matter of law.

V. RESPONDENT HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY REASON FOR REMOVING COMPLAINANT FROM SERVICE, WHICH COMPLAINANT CANNOT ESTABLISH IS PRETEXTUAL

Finally, Respondent's reason for removing Complainant from service clearly qualifies as legitimate and nondiscriminatory, and Complainant has offered no evidence whatsoever to suggest that Respondent's proffered reason for removing him from service is pretextual. Thus, even if Complainant could establish *prima facie* cases of age and perceived handicap discrimination, Complainant's claims would still fail.

RECOMMENDATION

Based on the foregoing, there is no genuine issue of material fact regarding any of Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that: 1) Respondent's Motion be granted; and 2) the complaint and underlying charge be dismissed in their entirety with prejudice.

**HUMAN RIGHTS COMMISSION**

BY: \_\_\_\_\_

**LESTER G. BOVIA, JR.  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION**

**ENTERED:** February 22, 2010